SUPREME COURT, U. S.

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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1261

MARY ALBRIGHT, Administratrix of the Estate of CHARLES ALBRIGHT, deceased, *Petitioner*,

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

HAROLD R. SCHMIDT, Esq.
RAYMOND G. HASLEY, Esq.
Attorneys for Respondent,
R. J. Reynolds
Tobacco Company

Of Counsel:
ROSE, SCHMIDT AND DIXON
919 Oliver Building
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 630 SECOND AVENUE, PITTSBURGH, PA. 15219

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STATUTES

United States Code, Title 28, Section 1332(a) .. 2, 5, 8

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OPINIONS BELOW

The Memorandum Order entered by Judge Adams of the United States Court of Appeals for the Third Circuit, dated January 18, 1974, and not yet recorded, is appended to the Petition for a Writ of Certiorari, pages A-1 through A-3 of the Appendix thereof. The Judgment Order entered October 25, 1973 is reported at 485 F.2d 678 (3rd Cir. 1973) and is also appended to the Petition, pages A-4 and A-5 of the Appendix. This Judgment Order was clarified by the Court by Order dated November 23, 1973, which is appended to the Petition, pages A-6 and A-7 of the Appendix. The Order dated November 30, 1973 denying Petition for Rehearing is appended to the Petition, pages A-8 and A-9 of the

Opinions Below.

Appendix. The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 350 F.Supp. 341 (W.D. Pa. 1972). This Opinion is appended to the appeal to the United States Court of Appeals for the Third Circuit, pages 239a through 261a of the Joint Appendix which is, according to Petitioner, being certified to this Court.

JURISDICTION

Respondent respectfully draws the Court's attention to the fact that, while the United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the Complaint on the ground that Petitioner failed to come forward with any evidence to establish the jurisdictional amount requirements of 28 U.S.C. §1332 (a), the Court left undisturbed the alternative ground stated by the District Court in support of its Order of Dismissal — namely, that "Plaintiff has secured prior satisfaction for the same injury claimed here."

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Should this Court grant Certiorari where the District Court, *inter alia,* applied the jurisdictional test as formulated by this Court and dismissed the Complaint on the ground that plaintiff, after being given repeated opportunity to do so, failed to come forward with any evidence in support of the general damage allegations of the Complaint, and such dismissal was affirmed by the Court of Appeals?

COUNTER-STATEMENT OF THE CASE

On December 14, 1961, Charles Albright was in an accident in which his automobile struck an excavation allegedly due to the negligence of the City of Pittsburgh. On July 5, 1962 he brought suit for injuries received therefrom against the City of Pittsburgh in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 291 October Term, 1962 (67a).* The Complaint alleged that he suffered contusions and blows to his chest, contusions of the abdomen, and injuries of the wrist, and also alleged grave emotional distress and great pain and suffering, all of which would be of a permanent nature (68a-69a).

In answers to interrogatories submitted by the City of Pittsburgh, Mr. Albright claimed that among the consequences of his injuries resulting from the City's negligence was the development of cancer of the lung. Those interrogatories and answers were filed July 10, 1964 and insofar as relevant are set forth on pages 70a through 74a of the Joint Appendix.

As early as March and April of 1963 it had been determined by the Social Security Administration that Charles Albright was totally and permanently disabled by reason of the following: essential hypertension; hypertensive heart disease; diabetes mellitus; obesity; and varicose veins with venous stasis (165a-173a). This determination was made before Charles Albright's lung cancer was diagnosed in November, 1963.

On August 27, 1965 Charles Albright was admitted to the Veterans Administration Hospital with rectal

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*References are to the Joint Appendix filed with the Court of Appeals for the Third Circuit.

bleeding, which was diagnosed as due to proctitis and an anal fissure (155a). While there, he was also treated for giant cell carcinoma of the chest wall and ribs, metastatic from the right lung; empyema; wound infection, postoperative; diabetes mellitus, mild; arteriosclerotic heart disease; hypertension; aspiration pneumonitis; and fatty liver (155a).

Thereafter, on October 27, 1965, more than two years after having been found to be totally disabled by the Social Security Administration and more than one year after injecting his cancer claim into the City suit, and while the suit against the City was still pending, Charles Albright filed a Complaint against the instant Respondent in the District Court alleging that the instant Respondent was liable for his alleged cancer and resulting damages (1a).

He died on November 13, 1965 (155a). His widow was substituted as Plaintiff, both in the City suit (67a) and in the instant suit (5a).

On December 22, 1967 Plaintiff's attorney in the City suit (who also represents Petitioner in the instant litigation), pursuant to a settlement reached at court-supervised conciliations for which a consideration was paid, and without any reservation, marked the Common Pleas docket "Settled and Discontinued" and signed it (67a, 77a).

On the basis of the above facts, Respondent herein moved for summary judgment on the ground that the settlement and discontinuance of the suit in the State Court precluded the suit in the District Court. In addition, Respondent moved to dismiss the Complaint for failure to establish the minimum jurisdictional

amount on the basis that as a matter of law there was no evidence to present to the jury which would enable it to attribute any of the damages suffered by Charles Albright to the claim alleged herein and distinguish those claims for damages from the other numerous chronic and acute health problems which Petitioner never asserted were caused by smoking.

From the inception of Petitioner's suit up until the filing of Respondent's Motion for Summary Judgment and to Dismiss on August 29, 1972 Petitioner had expended seven years, six Complaints, two Pre-trial Narratives, two Briefs on damages, one five-hour Pre-trial Conference and many other hearings and still had totally failed to set forth facts relating to damages sufficient to satisfy the jurisdictional requisites of 28 U.S.C. §1332(a) (64a). Even so, the District Court was reluctant to grant Respondent's Motion without providing yet additional time within which Petitioner would be allowed to bring forth evidentiary material in support of her damage allegations (89a). As stated by the Court in the Pre-trial Conference occurring on August 30, 1972:

> *The Court*: How much time do you think you will need to prepare your answer adequately?
>
> . . . .
>
> I am not saying that you can only have ten days. I will allow you a reasonable time, because remember that summary judgment is drastic, it is a sudden-death remedy. We take extreme care on that. We give you every opportunity to produce the materials that are necessary to rebutt [*sic*] it.
>
> However, you are subject to have dismissal, summarily, if you don't produce the evidentiary

material. Read 56 carefully, with no amendment. It says. 'When the moving party makes a motion and adequately supports it with evidence, the responding party cannot sit on his bare denial or allegations of pleadings but must produce counter-evidence showing the existence of a material issue of fact.'

. . . .

I am not telling you how to do it. I am telling you what you must do, but you would be subject to that. How much time do you reasonably need to meet this?

. . . .

(Discussion was held off the record.)

The Court: It will be 4:00 p.m., the 25th [of September], all right. (89a-91a).

Petitioner did not heed the admonition of His Honor Judge Weber and failed to produce the requested evidence. Nevertheless, Judge Weber allowed Petitioner yet another opportunity to come forth with the requested evidentiary materials, stating exactly the materials he thought relevant (197a-205a). Such opportunity was afforded Petitioner by Judge Weber at the hearing on Respondent's Motion for Summary Judgment held September 26, 1972.

Subsequently, Petitioner filed several additional affidavits allegedly in support of her damages allegations — none of which met Judge Weber's request.

On October 23, 1972, Judge Weber granted Respondent's Motion for Summary Judgment against Petitioner and to Dismiss the Complaint. In granting Re-

spondent's Motion to Dismiss the Complaint for lack of jurisdiction, Judge Weber held that:

> Thus, the plaintiff has failed to show that any evidence can be produced admissible in the trial of this action to support a claim for damages for (1) medical expenses incurred as a result of the trauma unrelated to other conditions not caused by the trauma; (2) pain and suffering endured as a result of the trauma unrelated to other conditions not the result of the trauma; and (3) loss of earnings or earning power.
>
> The plaintiff has been given ample and repeated opportunity to come forward with legally sufficient evidence to show that there is a genuine issue of fact as to damages. The plaintiff has been unable to carry the burden of proof on this issue. We are convinced to a legal certainty that the evidentiary material submitted will not support a claim in excess of the jurisdictional minimum of $10,000. Nelson v. Keefer, 451 F.2d 289 [3rd Cir. 1971]; Dowling v. J. C. Penney Co., 300 F. Supp. 307 [W.D. Pa. 1969]. (260a-261a).

On October 31, 1972, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

On October 25, 1973, the Court of Appeals for the Third Circuit, in an Order explicitly based upon a careful review of the record and the briefs submitted to it, affirmed *per curiam* the judgment of the District Court for the Western District of Pennsylvania.

On November 8, 1973, Petitioner petitioned for rehearing. On November 23, 1973, the Court of Appeals

clarified its Order, basing its affirmance on the jurisdictional amount requirement of 28 U.S.C. §1332(a).

During the week of December 3, 1972 Petitioner sent a second petition for rehearing to the Court of Appeals, contending that her claim complied with the jurisdictional requisites.

On December 18, 1973, the Court entered an Order denying a motion to file this second petition for rehearing out of time.

On January 2, 1974, Petitioner, in a letter to the Chief Judge of the Court of Appeals for the Third Circuit, asserted that the Court was required to hear Petitioner's second petition for rehearing. The Court, treating the January 2, 1974 letter as a petition for reconsideration of the December 18, 1973 Order, denied the same in its January 18, 1974 Memorandum Order.

ARGUMENT

The District Court Accurately Applied the Proper Jurisdictional Test to the Facts Set Forth in the Record; There Is No Special or Important Reason for Review and, Accordingly, the Petition for a Writ of Certiorari Should Be Denied.

It is obvious that this case does not involve the "special and important reasons" that would warrant this Honorable Court's granting a Petition for a Writ of Certiorari. There is no conflict among the various Courts of Appeals as to what is the proper jurisdictional test. Nor does Petitioner demonstrate that such a conflict exists.* In fact, the Petitioner herein adopts the very test applied by the District Court in this case (see Petition for a Writ of Certiorari, page 8), so that Petitioner's argument relates only to the application of that test by the District Court herein.

An examination of the Record at pages 259a through 261a demonstrates that the District Court applied the very jurisdictional test requested by Petitioner here. The test applied was totally in keeping with the policy and the test explained by this Honorable Court in *St. Paul Mercury Indemnity Company v. Red Cab Company,* 303 U.S. 283 (1938):

> . . . [I]f, from the face of the pleadings, it is ap-

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*The Federal cases cited on pages 6 and 7 of the Petition for a Writ of Certiorari are merely cases wherein the injuries suffered by Plaintiffs supported claims in excess of the jurisdictional amount. The State Court cases cited relate primarily to the leeway which courts or juries have in determining the value of claims. These cases do not relate to the jurisdictional issues presented in this case.

> parent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff was never entitled to recover that amount, . . . the suit will be dismissed.
>
> *St. Paul Mercury Indemnity Company v. Red Cab Company, supra,* at 289.

Accord, Horton v. Liberty Mutual Insurance Co., 367 U.S. 348, 353 (1961); *Nelson v. Keefer,* 451 F.2d 289 (3rd Cir. 1971).

When Respondent moved to dismiss for failure to meet the jurisdictional amount, Petitioner "failed to show that any evidence can be produced admissible in the trial of this action to support a claim for damages . . ." (260a). The Court therefore dismissed Petitioner's case, finding "to a legal certainty that the evidentiary material submitted will not support a claim in excess of the jurisdictional minimum of $10,000" (260a-261a). The Court of Appeals unanimously affirmed. That affirmance is amply supported by the record.

The issue on appeal was simply whether the District Court accurately applied the jurisdictional test to the facts of record. As demonstrated at pages 3 and 4, *supra,* Petitioner's decedent was suffering from numerous disabling physical conditions, including particularly conditions causing pain and suffering to his chest. However, as the District Court noted, these conditions were either totally unrelated to Petitioner's claim against Respondent or were included among the subject matters of a claim previously litigated and settled with the City of Pittsburgh, which constituted a separate ground for dismissal in the District Court. Thus, as to the jurisdictional issue, the question was

not one of the value of damages for cancer, but was Petitioner's failure to come forward with evidence separating the sequelae of the various physical conditions from which decedent suffered.

This issue was stated clearly to Petitioner by the District Court at the hearing on Respondent's motions (197a-198a):

> *The Court*: But the defendants still raised an issue, and that is that hospital record does show a great many conditions on admission, a great many very serious conditions. You will note them. Now, you are going to be under a burden, at some time, to show that you can isolate the cancer from the rest of those and show what the attributable amount of medical bills and the attributable amount of pain and suffering to that condition is? If you cannot separate them, you won't put any evidence in at trial unless the jury can clearly find that, and it is the Court's function, when the question is raised by motion of summary judgment or as part of the pretrial conference, [44] to require the plaintiff to show how he is going to be able to present this evidence and, if he cannot, I think summary judgment is proper.

The Court of Appeals, as noted above, has already reviewed and approved the District Court's application of the jurisdictional test. Therefore, further review of that issue by this Court is unwarranted.

There is no basis for Petitioner's request that the case be remanded to the State Court. This case was not removed after an initial filing in State Court, but was brought in District Court in the first place. It never was in the State Court and, therefore, cannot be remanded there.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HAROLD R. SCHMIDT, Esq.
RAYMOND G. HASLEY, Esq.
Attorneys for Respondent,
R. J. Reynolds
Tobacco Company
Members of the Firm of
ROSE, SCHMIDT AND DIXON